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91-544

No. - .

In the Supreme Court of the United States

October Term, 1991

CAMPBELL'S MOVING COMPANY, INC.,

Petitioner,

v.

MARTIN L. GOOZMAN,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTION PRESENTED FOR REVIEW

1. Pursuant to the Decision of this Court in Maislin Industries, Inc., et al. v. Primary Steel, Inc., 497 U.S. ____ 110 S.Ct. 2759, 111 L.Ed.2d 94 (1990), is a Trustee in Bankruptcy exempt from the requirement set forth in Maislin that all shippers are bound to pay the lawful tariff charges in an action by a motor common carrier subject to the provisions of the Interstate Commerce Act to recover its lawful tariff charges on traffic transported by the Trustee in the process of consolidating the estate?

PARTIES TO THE PROCEEDING BELOW

Appellant in the court below was Campbell's Moving Co. a Pennsylvania Corporation, which was a motor common carrier regulated by the Interstate Commerce Act.

Appellee in the court below was Martin L. Goozman, Trustee in Bankruptcy for the estate of MBI Business Centers, Inc.

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49 U.S.C. Section 10762(a)(1)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

CAMPBELL'S MOVING COMPANY, INC.,

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v.

MARTIN L. GOOZMAN,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Campbell's Moving Company, Inc. prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Fourth Circuit entered in this cause on June 28, 1991.

OPINIONS BELOW

The decision of the Court of Appeals was not recommended for full-text publication. It is reproduced as Appendix A hereto.

The District Court decision was not recommended for full text publication. It is reproduced as Appendix B hereto.

The decision of the Bankruptcy Court was not recommended for publication. It is reproduced as Appendix C hereto.

GROUNDS FOR THE COURT'S JURISDICTION

The decision of the Court of Appeals was entered on June 28, 1991. No petitions for rehearing were filed. The jurisdiction of this Court is invoked under Section 1254 (10), Title 28 of the United States Code.

STATUTES INVOLVED

Section 10761(a) of the Interstate Commerce Act, 49 U.S.C. Section 10761 (a) provides:

> Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for

> the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

Section 10762(a) (1) of the Interstate Commerce Act, 49 U.S.C. Section 10762(a) (1) provides:

> A carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title (except a motor common carrier) shall publish and file with the Commission tariffs containing the rates and (A) if a common carrier, classifications, rules, and practices related to those rates, and (B) if a contract carrier, rules and practices related to those rates, established under this

> chapter for transportation or service it may provide under this subtitle. A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle. The Commission may prescribe other information that motor common carriers shall include in their tariffs. A motor contract carrier that serves only one shipper and has provided continuous transportation to that shipper for at least one year may file only its minimum rates unless the Commission finds that filing of actual rates is required in the public interest.

Section 503(b) (1) (A) of Title 11 of the United States Code provides:

> After notice and a hearing, there shall be allowed, administrative expenses, other than claims allowed under section 502 (f) of this title [11 USCS Section 502(f)], including-
>
> (1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or

commissions for services rendered after the commencement of the case;

FEDERAL JURISDICTION

The cause of action arose under Sections 10761 (a) and 10762(a)(1) of Title 49, and Sections 503(b)(1) of Title 11 of the United States Code. Jurisdiction of the United States Court of Appeals for the Fourth Circuit was invoked pursuant to Sections 1291 and 1294(1) of Title 28 of the United States Code.

STATEMENT OF THE CASE

This case raises the same issues of the duty of a carrier to collect and a shipper to pay the filed tariff rate, which this Court addressed in its decision of Maislin Industries, Inc. et al. v. Primary Steel, Inc., 497 U.S. _____, 110 S.Ct. 2759, 111 L.Ed. 2d 94 (1990). This case is however

factually dissimilar from the Maislin case in that, in this case, the shipper of the goods was a Trustee in bankruptcy. Therefore this case raises the question of whether a Trustee, which acknowledged in the proceedings below that it was both the consignor and the consignee of the shipments at issue, is exempt from the ruling of this Court in Maislin.

Petitioner Campbell's Moving Company, Inc. (hereinafter Campbell's) is a motor common carrier of household goods. It provides transportation services to the shipping public under a Certificate of Public Convenience and Necessity issued to it by the Interstate Commerce Commission.

The bankruptcy proceedings which have lead to this dispute, commenced with the voluntary petition under Chapter 11 filed by M.B.I. Business Centers (hereinafter referred to as MBI) on September 18th, 1987. Its wholly owned subsidiary, Prodigy Systems, Inc. filed its Petition under

Chapter 11 on October 13th, 1987. On December 18th, 1987, the court converted the cases to proceedings under Chapter 7. The Trustee was appointed for both cases on December 23rd 1987.

On January 21st, 1987, pursuant to the instructions of an agent of the Trustee in Bankruptcy, Campbell's began picking up the goods of the estate and delivering them to a central warehouse in Chantilly, Virginia. This consolidation had been ordered by the Trustee in bankruptcy to facilitate the management of the goods of the estate and their final sale.

At each of the 21 locations at which Campbell's picked up goods, it's employees were let in by employees of the Trustee, told by those employees what to take, and what not to take, and requested and got the signatures of those employees on the bills of lading it issued governing the movements. The goods moved under household goods bills

of lading which provided that both the consignor and the consignee were liable for the payment of the freight charges.

On delivery to the Chantilly warehouse, employees of the Trustee accepted delivery of the goods from Campbell's.

Campbell's sent the trustee an invoice dated March 3, 1988, for $110,329.26 based on a 25% discount on the tariff rate as calculated by Campbell's. Subsequently, Campbell's sent the trustee another invoice also dated March 3, 1988, for $149,968.41, which did not include the discount. The second sum was sought in Campbell's application for administrative expense.

In his Memorandum of Decision dated August 28th 1989, the Bankruptcy Court found that Campbell's was not entitled to compensation in the amount of the full tariff rate, but was entitled to $100,000.00, representing the actual value of Campbell's services to the estate.

In his Decision, Judge Mannes said:

> Even within the sphere of Title 49, the filed rate doctrine is not absolute; it is subject to the standard of reasonableness provided by 49 U.S.C. Section 10701(a), which states:
>
> Section 10701. Standards for rates, classifications, through routes, rules and practices.
>
> (a) A rate (other than a rail rate) classification, rule, or other practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title must be reasonable. A through route established by such a carrier (including a rail carrier) must be reasonable. Divisions of joint rates by those carriers (including a rail carrier) must be made without unreasonable discrimination against a participating carrier and must be reasonable.

The Interstate Commerce Commission has announced its policy to review on reference from a court, unreasonable practices or [sic] motor carriers respecting unfiled negotiated tariffs: "We believe, in the highly competitive motor carrier industry and economy in general, equitable defenses to rigid application of filed tariff rates should be available on a case by case basis and that our unreasonable practice jurisdiction authorizes such an approach." National Industrial Transportation League - Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates, 3 I.C.C. 2d 99 (1986). The ICC policy has sparked opinion pro [citations omitted]. The relevance of this doctrine is that it convinces the court that the filed rate doctrine is not as unassailable as Campbell's urges. Memorandum of Decision, 12-13.

Bankruptcy court concluded that a reasonable sum for a common carrier to collect for this shipment was $100,000.00, and awarded that sum to Campbell's.

Both parties appealed this decision to the District Court. This court also found that the carrier's filed tariff rate was entitled to no particular deference, and, applying a cap which had been placed in the Trustee's initial request for administrative expense to transport these goods, decided that Campbell's was entitled to $25,000.00, of which it was to get $19,686.00 from P.R. Logistics, an unlicensed transportation broker which had been involved in the transaction.

In its Decision, the District Court acknowledged that the Decision of this Court in Maislin had been cited to it:

> In addition, Campbell's has submitted the United States Supreme Court case of Maislin Industries, U.S.,

Inc. v. Primary Steel, Inc., slip op. no. 89-624 (June 21, 1990) as authority for its position. That case is distinguishable from the present case and is therefore inapplicable.

The Court of Appeals for the Fourth Circuit affirmed this judgement. It did not directly address the Decision of this Court in Maislin, which decision had been extensively brought to that court's attention, but the language of its decision is intrinsically contradictory to the Maislin decision.

A few salient facts are worth reiterating, however. Campbell's never contracted with, nor even spoke to, the bankruptcy trustee directly, nor did Campbell's ever inform the trustee or his employees that Campbell's would demand payment of its tariff rate. Campbell's never sought nor obtained the advance approval of the bankruptcy court.

> Campbell's failed to take the steps necessary to insure payment of its tariff rate. Campbell's is not now entitled to an order compelling the trustee to pay more than eight times the price he agreed to pay for the transportation of the assets of the bankruptcy estate. (Page 9) (emphasis supplied)

REASONS WHY THIS WRIT SHOULD BE GRANTED

A. The Ruling Below Conflicts with Decisions of this Court

The decision of this Court in Maislin is one of a long line of decisions from this Court which have held that a shipper is bound by law to pay the filed tariff rate of the common carrier which transported its goods. See e.g. Keogh v. Chicago & Northwestern R.Co., 260 U.S. 156, 163, 43 S.Ct. 47, 49, 67 L.Ed. 183; Texas & Pacific R.Co., v. Mugg, 202 U.S. 242, 245, 26 S.Ct. 628, 630, 50 L.Ed. 1011;

Louisville & Nashville R. Co. v. Maxwell, 237 U.S. 94, 97, 35 S.Ct. 494, 495, 59 L.Ed. 853; Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd., 460 U.S. 533, 535, 103 S.Ct. 1343, 1344, 75 L.Ed 2d 260.

This Court has consistently held that neither mistake nor fraud nor ignorance of the filed tariff rate can change this duty, but the Court of Appeals for the Fourth Circuit has found that a Trustee in bankruptcy, an officer of the court, presumptively better aware of the requirements of the United States Code than is the average shipper, is exempt.

Such an exemption is not contained in either the Bankruptcy Code of the United States, Title 11 of the United States Code, nor is it set forth in Title 49 of the United States Code, governing transportation.

In its treatment of the case, the District Court explained its divergence from the filed rate doctrine as a result of the fact that the Trustee was

acting for an estate in bankruptcy and bankruptcy changes things. This is true but irrelevant. The cases cited in support of the proposition that a Trustee in bankruptcy need not pay a carrier's filed rate, were alike in one regard, they all concerned a situation in which the transportation charges were incurred pre-petition and the Trustee was permitted to pay a fractional share of those charges, proportionate to that received by other, unsecured creditors. e.g. In re Roll Form Products, Inc., 662 F.2d 150 (2d Cir. 1981); In re Penn-Dixie Steel Corp., 6 B.R. 817 (B.C. S.D.N.Y. 1980), aff'd 10 B.R. 878 (S.D.N.Y. 1981) That is not the situation here. In this case, the estate itself incurred these expenses post-petition as an administrative expense. Therefore, the Trustee cannot use the truism that "bankruptcy changes things" because there has been no intervening bankruptcy between the time the shipper and carrier entered into this contract

and the present time. The Trustee has been unable to find one citation which would support its premise that, despite the absence of such exempting language in either the Transportation or the Bankruptcy statutes, it is exempt from the universal provisions of the filed rate doctrine.

B. Allowing the Decision of the Court Below to Stand Would Create a Conflict between the Rule Adopted in the Fourth Circuit and the Decisions of other Courts of Appeal after the Decision of this Court in Maislin

Subsequent to the Decision of this Court in Maislin, one Court of Appeals has directly addressed the issue of whether equitable considerations can estop a common carrier in interstate commerce from collecting its filed tariff rate. In Orr v. Interstate Commerce Commission, 912 F. 2d 119, 121-2, the Court of Appeals for the Sixth Circuit followed this Court in

finding that the filed rate doctrine was binding on shippers and could not be waived. Therefore, allowing the Fourth Circuit to create an exception to the doctrine, to which this Court and the Sixth Circuit have seen none, will create a conflict between the Circuits.

C. Allowing the Decision of the Court Below to Stand Would Create an Unnecessary Conflict between Federal Statutes

As this Court has set forth in the Maislin Decision, the collection of a carrier's filed tariff rate is not an issue which can be tempered by equitable considerations, it is a matter of applying the law as Congress created it. The decision of the Fourth Circuit would imply an exception clause into the statute which does not exist in either of the Titles in which Congress might have chosen to include it. Under the Fourth Circuit's

interpretation of the Statutes, a Trustee is to have wide discretion not to abide by federal law when those laws would hinder him in the administration of the estate.

This conflict does not need to exist. A reading that would allow the two statutes to be harmonized would require that the Trustee pay the value to the estate of the services rendered and that when those services are rendered by an entity required by law to charge a certain rate, that rate is the measure of the value of the services to the estate.

To find otherwise would vitiate the purpose of giving priority of payment to administrative expenses. In effect, the tariff rate is the contract price, which the shipper is presumed, by law to know. See for example, Louisville & Nashville R. Co. v. Maxwell, supra, in which the person held to liable to pay the filed tariff rate was an ordinary train passenger, although this would have been a logical

time for the Court to have relaxed the requirements of the filed rate doctrine, in that case and in all the other cases that this Court has decided on the issue, it has come to the conclusion that no such relaxation is possible.

What vender or provider of services would be willing to give value to a Trustee in bankruptcy, if it were known that, after the services have been completed, the Trustee could tot up the balances and decide that the decision to utilize those goods and services did not benefit the estate and therefore the Trustee is not bound to pay the agreed upon price for them? If that were true, merchants and providers of services would become concerned about the uncertainty of working for a Trustee, and Trustees would be unable to procure the goods and services they need to administer estates. That cannot be, and is not the law. Where a Trustee enters into a contract for the provision of goods and services, it is

bound by the terms of that contract. Under the filed rate doctrine, the Trustee has no protection in the defense that he was unaware of the terms of that contract, the law presumes him to have known.

CONCLUSION

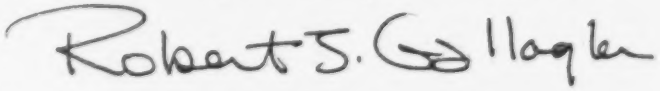
This Court has already announced its support for the filed rate doctrine. However, the exception carved into that doctrine by the Fourth Circuit now makes it necessary for this Court to return to that matter. It is for this Court to determine whether the Courts of Appeal have it within their power to make an exception to a rule long a part of the law of this country, to which this Court did not feel free to make exceptions.

The powers delegated to the bankruptcy courts by Congress are broad, and there is a tendency in the district courts, when confronted with a

ruling by a bankruptcy court to accept them on the grounds that "bankruptcy changes things." But no statute, regulation or case can be cited to justify ignoring the specific holding of this Court in Maislin. Such a rejection should not be tolerated.

Petitioner therefore requests this Court to grant this writ for certiorari and that same be issued to the United States Court of Appeals for the Fourth Circuit to the end that its decision be reversed and held null, and that the Trustee be commanded and held liable to pay the full filed rate of the motor common carrier.

Respectfully submitted,



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